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No. 91-468

In The

Supreme Court of the United States

October Term, 1991

CHABAD-LUBAVITCH OF VERMONT,
RABBI YITZCHOK RASKIN,

Petitioners,

v.

CITY OF BURLINGTON, VERMONT, BOARD OF PARKS AND RECREATION COMMISSION,

Respondents,

–and–

AMERICAN CIVIL LIBERTIES FOUNDATION OF VERMONT, INC., MARK A. KAPLAN, ESQ., REVEREND ROBERT E. SENGHAS,

Intervenor-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

INTERVENOR-RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below erred in holding that the "semi-permanent" display of a solitary unattended religious symbol on public property closely associated with the seat of municipal government violates the establishment clause of the first amendment.

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The Intervenor-Respondents, American Civil Liberties Foundation of Vermont, Inc.[1], Mark A. Kaplan, Esq.,

[1] Pursuant to Sup. Ct. R. 29.1, The American Civil Liberties Foundation of Vermont, Inc., discloses that it is a non profit subsidiary of the American Civil Liberties Union of Vermont, Inc., a non profit corporation.

and Reverend Robert E. Senghas, respectfully request that this Court deny the instant petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

City Hall Park is located in the commercial center of downtown Burlington. It is a two and one-half acre park bounded on the east by Burlington City Hall and two other buildings. In effect, City Hall Park serves as the lawn for City Hall, while the latter serves as the backdrop for the Park. *See Kaplan v. City of Burlington*, 700 F. Supp. 1315, 1317 (D.Vt. 1988), *rev'd*, 891 F.2d 1024, 1025-1026 (2d Cir. 1989).[2] Lower courts have noted the "Park's close association with the seat of city government." *Id.* at 1030; 754 F. Supp. at 377 ("a park the whole of which is associated with City Hall").

One of twenty-eight city parks, City Hall Park is managed by the City of Burlington.[3] The Park is a traditional public forum; however, access to and use of

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[2] In his findings of fact Judge Parker adopted the characterization of City Hall Park set out in *Kaplan v. City of Burlington*, 700 F. Supp. 1315 (D. Vt. 1988), *rev'd* 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990). *Chabad-Lubavitch v. City of Burlington*, 754 F. Supp. 372, 373 n.2 (D. Vt. 1990). Petitioners' App. 10a.

[3] Immediately following the District court's decision the Petitioners were permitted to erect their menorah in Battery Park, which is located approximately one half mile from City Hall Park, for the entirety of Chanukah. 936 F.2d at 111. Petitioners' App. 4a.

the Park is not unlimited. A municipal ordinance regulates the issuance of permits for large groups or for long-term use of the Park.[4] With the exception of Petitioners' menorah, no unattended religious symbols have been permitted on a semi-permanent basis in the Park. 891 F.2d at 1026. Petitioners' App. 24a.

On November 28, 1990, Petitioners applied for a permit to display their sixteen foot by twelve foot menorah in City Hall Park. Prior to any determination of Petitioners' application, the City also received an application from one Stephen C. Brooks to erect two "holiday signs" near the proposed site for Petitioners' menorah. His signs bore secular messages endorsing peace, season's greetings and liberty. A permit for that display (the "Brooks' display") was approved by the City. 754 F. Supp. at 374. Petitioners' App. 10a-12a.

Petitioners' application was denied on December 6, 1990, and, on the following day, they filed suit seeking injunctive relief to require issuance of a permit. Trial was held in the United States District Court for the District of Vermont, the Honorable Fred I. Parker presiding, on December 10 and 11, 1990, at which time Respondents American Civil Liberties Foundation of Vermont, *et al.*, were permitted to intervene as party defendants. The court accepted the parties' partial stipulation of facts and took further evidence including an on-site view of the menorah and the Brooks' display in City Hall Park. On December 11, 1990, the court issued an oral finding that

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[4] Burlington, Vt., Code of Ordinances, Appendix D § 1 (1973).

the proposed display of Petitioners' menorah would violate the establishment clause of the first amendment of the United States Constitution. On December 18, 1990, the court issued its formal findings of fact and conclusions of law. *Chabad-Lubavitch of Vermont v. City of Burlington*, 754 F. Supp. 372 (D.Vt. 1990), Petitioners' App. 8a-20a. The court distinguished the instant situation from the combined display upheld in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), finding that:

> [f]rom many areas within and around the Park, the menorah appears to stand alone, or, at least, adjacent to two pieces of white plywood. An objective viewer could not reasonably conclude that a religious symbol was "added to" a dominant secular display in this instance . . .
>
> [Moreover,] from at least one well-travelled place on College Street and its sidewalk, City Hall framed the view of the menorah. And from a considerably larger area, both City Hall and the menorah appeared together in the field of vision.

754 F. Supp. at 377-378. Petitioners' App. 18a-19a. Based on those findings, the court concluded that the display of the menorah "standing in the shadow of City Hall" would convey a message of governmental endorsement of religion to an objective observer. *Id.* at 378.

Petitioners appealed to the U.S. Court of Appeals for the Second Circuit. The court affirmed the decision of the United States District Court for the District of Vermont. *Chabad-Lubavitch of Vermont v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991) (*per curiam*). Petitioners' App. 1a-7a. In a unanimous decision it found that the case presented

was indistinguishable from *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990), Petitioners' App. 21a-41a, which held that "the display of an unattended, solitary, semi-permanent religious symbol in the Park, given the Park's 'close association with the seat of city government,' violates the Establishment Clause." *Chabad-Lubavitch*, 936 F.2d at 111 (quoting *Kaplan*, 891 F.2d at 1030). Petitioners' App. at 5a. From that decision Petitioners now seek review by writ of certiorari.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

1. The Legal Issues Raised By The Petition Were Considered And Resolved By This Court Only Two Years Ago In *County of Allegheny v. ACLU*.

A. The Lower Courts Correctly Applied *Allegheny*.

Petitioners did not argue in their Petition that the Decisions below are inconsistent with this Court's recent holding in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the controlling case in this area. ("[*Allegheny*] clarified the involved and delicate Establishment Clause balancing act required when evaluating a religious display in a public context." *Smith v. County of Albemarle*, 895 F.2d 953, 956 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 74 (1990)).

Indeed, Petitioners could not so argue. The decisions of the District Court and the Court of Appeals are consistent with *Allegheny*'s holding that the display of solitary religious objects and symbols in areas closely associated

with core governmental functions violates the establishment clause of the first amendment to the U.S. Constitution because it " 'convey[s] a message that religion or a particular religious belief is *favored* or *preferred*.' " 492 U.S. at 593 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J. concurring)); *See also* 492 U.S. at 600 (Blackmun, J.) (Creche in seat of government communicates endorsement.).

The Second Circuit closely followed *Allegheny*. It found that the presence of nonreligious objects near the religious display would not cure the constitutional defect if the several objects were not conceived as a "unitary" display and the primary message conveyed by the religious display was one of religious endorsement. 936 F.2d at 112. The issue of endorsement is fact sensitive – contingent upon the particular "context"[5] – and both the District Court and Court of Appeals found that the addition of the Brooks' signs would not remove the aura of government imprimatur.[6] Applying the *Allegheny* holding to the "particular physical setting" of Burlington City Hall Park, both the District Court and Court of Appeals found

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[5] 492 U.S. at 597. ("Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion." *Id.* at 595.)

[6] As Justice O'Connor noted in her *Allegheny* concurrence, the focus of analysis is not the number of secular objects verses religious objects, but whether the effect of the overall display creates a message of endorsement of religion. "[T]he question here is whether Pittsburgh's holiday display conveys a message of endorsement of Judaism, when the menorah is the only religious symbol in the combined display. . . . " 492 U.S. at 634 (O'Connor, J. concurring).

that the display of Petitioners' menorah would violate the establishment clause. *Allegheny*, 492 U.S. at 597. The Petitioners have not challenged the lower courts' findings that this solitary display of the menorah would create an impression of endorsement in the mind of an objective observer.

B. The Decisions Below Do Not Conflict with the Holdings of *Widmar v. Vincent* and *Board of Education v. Mergens*.

Petitioners argue that the decisions of the District Court and the Court of Appeals are inconsistent with this Court's holdings in *Widmar v. Vincent*, 454 U.S. 263 (1980), and *Board of Education v. Mergens*, 495 U.S. ___, 110 S. Ct. 2356 (1990), which, Petitioners assert, mandate some form of an equal access policy to all public fora property. Respondents respectfully disagree; neither *Widmar* nor *Mergens* require unlimited access to public fora, and both decisions are distinguishable from this case on the law and facts. More significantly, however, the issue is not one of equality of access – as the City has not discriminated against Petitioners' menorah in favor of other religious objects and Petitioners continue to possess full access to City Hall Park for live uses – but whether governmental imprimatur of religion constitutes a compelling interest justifying limited restrictions on the long-term display of unattended religious symbols in close proximity to the halls of local government.

Contrary to Petitioners' assertions, *Mergens* does not stand for a constitutionally compelled right of access. *Mergens* involved a challenge under the Equal Access Act,

20 U.S.C. § 4071, *et seq.* (1984), a carefully designed statute that provides for a limited right of student access to public secondary school activity periods. This Court's discussion of equal access to the school facility was not made within the context of a park or a public forum but within the boundaries of a *statutory* right of access, termed a "limited *open* forum." 110 S. Ct. at 2364-2365.[7] The fact that *Mergens* did not involve a *constitutional* right of access is abundantly clear: *"Because we rest our conclusion on statutory grounds, we need not decide – and therefore express no opinion on – whether the First Amendment requires the same result."* 110 S. Ct. at 2370 (emphasis supplied).[8]

Even if *Mergens* has some application to public fora situations, its rationale is clearly distinguishable from this case on the facts. The Court's discussion of the difference between governmental and private speech and between religious and nonreligious speech was made within the

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[7] "First, the Act itself neither uses the phrase 'limited public forum' nor so much as hints that that doctrine is somehow 'incorporated' into the words of the statute. . . . Congress was presumably aware that 'limited public forum,' as used by the Court, is a term of art, [citation omitted], and had it intended to import that concept into the Act, one would suppose that it would have done so explicitly. *Indeed, Congress' deliberate choice to use a different term – and to define that term – can only mean that it intended to establish a standard different from the one established by our free speech cases." Id.* at 2367-2368 (emphasis supplied); *see* 20 U.S.C. § 4071(b) for a definition of a "limited open forum."

[8] *Accord,* Laycock, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 Nw. U.L. Rev 1, 36 (1986) ("The statutory 'limited open forum' is an artificial construct, and comparisons with the constitutional free speech cases can be misleading").

context of the controlled student meetings conducted at the end of the school day. *Id.* at 2371-2373.[9] More significant, however, is the fact that the religious expression at issue in *Mergens* and *Widmar* involved *live* student speech. Those cases did not involve, nor did this Court consider the type of sustained, unattended religious speech that is at issue below. *Accord, County of Albemarle,* 895 F.2d at 959.[10]

Finally, Petitioners' reliance on the entry order in *Chabad v. City of Pittsburgh,* 110 S. Ct. 708 (1989), is misplaced. *See* "Petition" at 10, n.5. *Chabad,* unlike this case, involved a menorah in a "combined holiday display."[11] That case was founded upon an allegation wholly absent

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[9] In fact, this Court specifically noted that other restrictions on student speech at other places and times of the day were permissible. *Id.* at 2372. Significantly, the Act implicitly prohibits other forms of religious use during the school day out of a fear of the appearance of religious endorsement. 20 U.S.C. §§ 4071(c)(2) & (3), (d)(1) & (2), § 4072(2) & (4).

[10] In *County of Albemarle,* the Fourth Circuit referred approvingly to the district court's determination that endorsement may depend on the expectations. With an equal access policy, there is a clear expectation that various groups will use the facilities. " 'Here, the display took place at the symbolic center of government. . . . because of the nature, size, location, and duration of the display, and its relation to the symbolic center of government, the appearance of a government *imprimatur* upon a certain religious ideology is present.' *Smith v. Lindstrom,* 699 F. Supp. 549, 565 (W.D. Va. 1988)." 895 F.2d at 959, n.6.

[11] Plaintiff's memorandum of law in support of motion for temporary restraining order and/or preliminary injunction, at 14 n.6, *Chabad v. City of Pittsburgh,* No. 89-2432 (W.D. Pa. December 21, 1989), expressly distinguishing *Kaplan.*

from this one, that the City of Pittsburgh's refusal to display the menorah was in retaliation for Chabad's exercise of its right to petition the courts.[12] Moreover, *Chabad* involved only a stay order by this Court and has no precedential authority. This Court did not reach a decision on the merits nor offer any written opinion; instead, all appellate proceedings were limited to a review of the district court's grant of a preliminary injunction to determine whether the grant constituted an abuse of discretion. *See* Motion to Vacate "Temporary Stay" or Preliminary Injunction, at 7, *Chabad*, 110 S.Ct. at 708; *see also Brown v. Chote*, 411 U.S. 452, 457 (1973) (on review of a preliminary injunction the appellate court restricts consideration to issues of abuse of discretion and expresses no view on the merits). To read any substantive meaning into the *Chabad* stay order is inaccurate and misleading.

2. There is an Absence of Meaningful Conflict Among the Circuits

The decisions below in this case are consistent with this Court's holding in *Allegheny* and every applicable religious display case since 1989. Both decisions closely followed the Second Circuit's earlier interpretation of *Allegheny* in *Kaplan*, a case this Court declined to review. 110 S. Ct. 2619. Moreover, the decisions below are consistent with the holdings of every circuit case that has considered similar issues on the merits, including the

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[12] Plaintiff's memorandum of law in support of motion for temporary restraining order and/or preliminary injunction, at 2, 4-8, *Chabad v. City of Pittsburgh*, No. 89-2432 (W.D. Pa. December 21, 1989).

Sixth Circuit. *See Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991) (decided on state constitutional grounds); *Doe v. Small*, 934 F.2d 743 (7th Cir. 1991); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3083 (U.S. July 19, 1991) (No. 91-141); *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990); *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 74 (1990); *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1937 (1990). Notwithstanding Petitioners' claims to the contrary, courts throughout the country have applied the same constitutional standards to religious displays when they have been provided a full and complete hearing on the merits. The fact that some courts have reached different conclusions as to the constitutionality of religious displays merely reflects the factually sensitive nature of these issues.

Any apparent conflict between this case and its predecessor *Kaplan* – which is the primary focus of attention in the Petition – and the recent decisions by the Sixth Circuit is illusory. The two recent Sixth Circuit cases relied on by Petitioners, *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303 (6th Cir. 1990), and *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458 (6th Cir. 1991), *appeal vacated*, No. 90-4084 (August 16, 1991), are both merely *stay orders*; neither decision involved a consideration of the merits of the respective cases.[13] In fact, the *Americans United* court did

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[13] "We strongly emphasize that we are not now deciding the appeal. That must wait until full briefing and the opportunity for oral argument." *Americans United*, 922 F.2d at 306.

not even have access to the trial transcript or to a written order. 922 F.2d at 305. The panel noted that its hasty decision was not binding on the Circuit during the ultimate appeal. *Id.* at 307. Later, the panel placed the same limitation on the authority of its decision in *Congregation Lubavitch*.[14] Thus the authority of both decisions is questionable even within the Sixth Circuit.

Moreover, the factual situations in *Americans United* and *Congregation Lubavitch* were sufficiently different from the instant case for the Sixth Circuit to distinguish those cases from *Kaplan*. In both cases the court found the sites in question did "not carry the same suggestion of imprimatur as a location near [Burlington] City Hall." 923 F.2d at 462; 922 F.2d at 309. For similar reasons, *ACLU v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990), is inapposite. *Wilkinson* is a factual anomaly; in that case the Sixth Circuit found that the object in question – an unadorned stable that was available for a host of uses – was itself a public forum. The *Wilkinson* court explicitly distinguished that case from the instant factual situation. *Id.* at 1102 ("[T]he case at bar is factually distinguishable from *Kaplan* in any event . . . "). Thus, at a minimum, these cases can be distinguished on their facts.

A more accurate reflection of the Sixth Circuit's application of *Allegheny* and general establishment clause analysis is found in *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990), where the court upheld a religious display

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[14] "This assessment is, of course, without prejudice to the ruling this court may ultimately make upon a full briefing and the raising of any other possible arguments concerning the circumstances of the application . . . " 923 F.2d at 463.

containing numerous secular objects.[15] Unlike the situation in *Americans United* and *Congregation Lubavitch*, the court had full benefit of a record and briefing on the merits. Most significantly, however, the Circuit applied the *Allegheny* rule in a manner consistent with that rule's application in the Second Circuit as well as in other circuits.[16] Consequently, no constitutional uncertainty exists at this point in time, and there is no critical need for this Court to review this case.

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[15] The *Clawson* display and the instant displays are factually distinct. In addition to a contested nativity scene, the display in *Clawson* contained four lighted and decorated Christmas trees, two gift packages with large bows, a Santa Claus figure, a large "Noel" sign, and holiday roping on the building. Similar holiday decorations adorned the nearby public library. 915 F.2d at 245.

[16] Nor does *Chabad-Lubavitch of Georgia v. Harris*, 752 F. Supp. 1063 (N.D. Ga. 1990), present a meaningful conflict. *Harris*, which upheld the denial of the display of a menorah in front of the Georgia State Capitol, was decided on time, place, and manner grounds. *Id.* at 1068. The court's discussion of the appropriateness of a content-based restriction, and its disinclination to follow *Kaplan*, was dicta. Moreover, Judge Evans based her consideration of the public forum issue on a similar misinterpretation of *Mergens* as has been urged by Petitioners in the instant case. 752 F. Supp. at 1067.

CONCLUSION

The instant petition presents no stronger a case for certiorari than did the petition in *Kaplan v. City of Burlington*, where certiorari was denied only last term. 110 S. Ct. 2619 (1990).

The decision at bar, like *Kaplan* before it, is closely tied to the particular context of this display. As the Second Circuit put it, the factual differences between the two cases are "inconsequential." *Chabad-Lubavitch*, 936 F.2d at 111, Petitioners' App. at 5a. Like *Kaplan*, it does not merit Supreme Court review.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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